

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
CenturyLink’s Petition for Forbearance Pursuant) WC Docket No. 14-9
to 47 U.S.C. § 160(c) from Dominant Carrier and)
Computer Inquiry Tariffing Requirements on)
Enterprise Broadband Services)

CENTURYLINK’S MARKET ANALYSIS COMMENTS

CenturyLink responds to the Public Notice (“PN”)¹ proposing a segmented market approach to the competitive analysis to be applied to CenturyLink’s Petition for Forbearance from dominant carrier and *Computer Inquiry* tariffing requirements imposed on its enterprise broadband services (“Petition”).² CenturyLink’s Petition and Reply Comments³ demonstrated that it is subject to strict (and no longer relevant) regulatory mandates that do not apply to its similarly situated competitors and larger incumbents. In granting forbearance relief to other incumbents in the *Enterprise Broadband Forbearance Orders*,⁴ the Commission repeatedly

¹ FCC Public Notice, *Wireline Competition Bureau Seeks Comment on Appropriate Market Analysis for CenturyLink Enterprise Forbearance Petition*, WC Dkt. No. 14-9, DA 14-845 (June 20, 2014) (“PN”).

² CenturyLink Petition for Forbearance, WC Dkt. No. 14-9 (Dec. 13, 2013) (“Petition”).

³ CenturyLink’s Reply Comments in Support of its Petition for Forbearance, WC Dkt. No. 14-9 (Feb. 28, 2014) (“Reply Comments”).

⁴ *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) (“AT&T Forbearance Order”), *aff’d sub nom. Ad Hoc Telecommc’ns. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009) (“Ad Hoc Appeal”); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title*

found that competition in the dynamic, rapidly expanding enterprise broadband service market at issue should be analyzed on a nationwide basis.⁵ In fact, the Commission has always analyzed competition in broadband markets on a nationwide basis in various types of proceedings.⁶

CenturyLink is pleased that the PN recognizes the competitive nature of the enterprise broadband market, but, contrary to the repeated competitive findings in the *Enterprise Broadband Forbearance Orders*,⁷ it appears to do so only in the case of nationwide broadband customers. The PN suggests the possibility of different geographic market definitions for different classes of customers experiencing different levels of competitive choices -- a possibility not considered in connection with the ILECs that have already been granted forbearance, and whose profiles are no different than CenturyLink's.⁸ If this approach resulted in a denial or partial denial of the Petition, however, such an outcome would harm consumers, violating fundamental fairness, bedrock principles of the Administrative Procedure Act ("APA"), and the Commission's policy of regulatory parity.

The approach contemplated in the PN would also be inconsistent with the more recent *Qwest Phoenix* precedent (which itself recognized that broadband markets are appropriately assessed on a national basis) and with Section 706 of the Telecommunications Act of 1996.

CenturyLink therefore continues to urge the Commission to grant forbearance relief with respect

II Common-Carriage Requirements; Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007) ("*Embarq-Frontier-Citizens Forbearance Order*"); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008) ("*Qwest Forbearance Order*") (together, the *Enterprise Broadband Forbearance Orders*).

⁵ See, e.g., *AT&T Forbearance Order*, 22 FCC Rcd at 18715-18 ¶¶ 18-21.

⁶ See Part II, *infra*.

⁷ See, e.g., *AT&T Forbearance Order*, 22 FCC Rcd at 18718 ¶ 21 & n.87.

⁸ See PN at 2-3.

to all of its enterprise broadband offerings, and to thereby place it on an equal footing with virtually all other significant incumbent providers of these services -- or at least on an equal footing with incumbents other than Verizon, which has been granted even greater freedom.⁹

I. CENTURYLINK MUST BE TREATED LIKE THE REST OF THE INDUSTRY

Given its precedents in this area, the Commission cannot alter the overarching legal principles that must be applied in reviewing the Petition. No party seriously disputes CenturyLink's demonstration that an agency may not "treat like cases differently."¹⁰ In *Airmark Corp. v. FAA*, the D. C. Circuit held that an agency has to "apply the same criteria" and "provide a consistent approach" "to all [parties] petitioning for exemptions" from a generally applicable requirement.¹¹ Similarly, in *Marco Sales*, the Second Circuit held that an agency is not permitted to "grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday"¹² The D.C. Circuit has also held that no deference is owed to an agency that "reached diametrically opposite conclusions on the basis of virtually [identical] situations," noting that, "despite its broad discretion," an agency "cannot . . . arbitrarily treat similar situations dissimilarly"¹³ Indeed, the

⁹ See Reply Comments at 7-8.

¹⁰ *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985) (quoting *United States v. Diapulse Corp. of America*, 748 F.2d 56, 62 (2d Cir. 1984)).

¹¹ *Id.* at 691, 695.

¹² *Marco Sales Co. v. FTC*, 453 F.2d 1, 7 (2d Cir. 1971) (quoting *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J., concurring), *rev'd on other grounds*, 382 U.S. 46 (1965)).

¹³ *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 869, 872 (D.C. Cir. 1978). See also *id.* at 870 (NLRB reached "essentially a different decision on essentially the same facts").

D.C. Circuit has invoked these very principles in considering a prior Commission decision to deny forbearance relief.¹⁴

These APA principles reinforce the Commission’s well-established policy of “regulatory parity” -- specifically, the “need to ensure regulatory parity” with other incumbent local exchange carriers (“ILECs”) granted similar forbearance relief.¹⁵ In granting relief in the *AT&T Forbearance Order* in 2007, the Commission stated that “[w]e seek to avoid persistent regulatory disparities between similarly-situated competitors, and seek to minimize the time in which they are treated differently.”¹⁶ The other *Enterprise Broadband Forbearance Orders* also granted relief partly on this basis.¹⁷ Similarly, last year, the *USTelecom Forbearance Order* granted certain ILECs forbearance from various rules that had previously been lifted from other ILECs.¹⁸

These principles, and the unbroken line of cases applying them, require full relief here, so that CenturyLink -- which represents less than ten percent of the national enterprise broadband market, and whose unforborne services represent only about *three* percent of that industry -- can compete on the same terms as the competitive carriers and forborne ILECs representing roughly

¹⁴ *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 303 (D.C. Cir. 2009).

¹⁵ *AT&T Forbearance Order*, 22 FCC Rcd at 18732 ¶ 50.

¹⁶ *Id.* (emphasis added).

¹⁷ *See, e.g., Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19503 ¶ 45 n.167.

¹⁸ *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627, 7637-38 ¶ 17, 7650-51 ¶ 41, 7675-76 ¶ 107 (2013) (“*USTelecom Forbearance Order*”) (forbearing from equal access scripting rules for “all ILECs . . . not previously . . . granted forbearance” and from accounting rules previously lifted from the Bell Operating Companies).

90 percent of the industry.¹⁹ The PN suggests that, in the case of CenturyLink, there might be different classes of customers experiencing different degrees of competitive choice, but that could also be said of all of the ILECs that have already been granted forbearance. There is no reason to believe that the profile of CenturyLink’s enterprise broadband customer base is significantly different from the other ILECs’ customer profiles. Accordingly, CenturyLink’s petition warrants a result no different from the nationwide forbearance grants in the *Enterprise Broadband Forbearance Orders*. No matter how the Commission might analyze this petition if it raised issues of first impression, the core fact is that it does not: The Commission has established an approach for addressing the issues raised here, has applied that framework to numerous other parties, and, as such, is bound to apply it to CenturyLink as well.

II. COMPETITION IN THE ENTERPRISE BROADBAND MARKET SHOULD BE ANALYZED ON A NATIONAL BASIS

The PN suggests the possibility of different geographic market definitions for different classes of customers and states that such an approach would be consistent with the *Qwest Phoenix Forbearance Order*.²⁰ That order, however, expressly acknowledges that it does *not* establish the proper standard to be applied in reviewing a broadband forbearance request.²¹ In the case of broadband services, the Commission’s precedents are unanimous in analyzing competition exclusively on a nationwide basis.

Even several years ago, in the *Enterprise Broadband Forbearance Orders*, the Commission concluded that for enterprise broadband services, as opposed to TDM offerings, it is

¹⁹ See Reply Comments at 10.

²⁰ *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010) (“*Qwest Phoenix Forbearance Order*”), *aff’d sub nom. Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

²¹ *Id.* at 8644 ¶ 39 (“a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities”).

appropriate “to look more broadly at competitive trends without regard to specific geographic markets,” because the market for these broadband services is “emerging and changing.”²² These orders relied on prior Commission decisions analyzing the evolving marketplace for broadband services on a national basis, including the *Wireline Broadband Order*²³ and the *Section 271 Broadband Forbearance Order*,²⁴ which are discussed in the Petition.²⁵ The *Section 271 Broadband Forbearance Order* relied in turn on the *Triennial Review Order*, in which the Commission concluded that the “competitive environment” for high-capacity broadband services²⁶ enabled it to “adopt a national approach” in relieving ILECs of unbundling obligations under Section 251.²⁷

The PN suggests that small or local customers might have fewer competitive choices in enterprise broadband services,²⁸ but the Commission has found that “even . . . customers” with “more regional or localized operations” “are able to solicit [enterprise broadband] . . . services

²² *AT&T Forbearance Order*, 22 FCC Rcd at 18716-17 ¶ 20; *Embarq-Frontier-Citizens Forbearance Order*, 22 FCC Rcd at 19489-90 ¶ 19; *Qwest Forbearance Order*, 23 FCC Rcd at 12272-73 ¶ 23.

²³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14880-81 ¶ 50, 14901-03 ¶¶ 91-94 (2005) (“*Wireline Broadband Order*”), *aff’d sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

²⁴ *Petition for Forbearance of the Verizon Telephone Cos. Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21502 ¶ 12, 21504 ¶ 19 (2004) (“*Section 271 Broadband Forbearance Order*”), *aff’d sub nom. EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006) (“*EarthLink*”).

²⁵ *See* Petition at 23-24.

²⁶ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17152 ¶ 292 (2003) (“*Triennial Review Order*”), *aff’d in relevant part and vacated in other respects, United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA*”), *cert. denied*, 543 U.S. 925 (2004).

²⁷ *Id.* at 17148 ¶ 286.

²⁸ PN at 2-3.

from a range of potential providers,” who can “self-deploy or obtain from” competitive local exchange carriers (“CLECs”) the facilities needed to offer enterprise broadband services anywhere.²⁹ The Commission accordingly decided that it should analyze market conditions on a “national basis.”³⁰ Since then, these trends have only intensified, as enterprise broadband prices have declined and CLECs have expanded their operations, using multiple alternatives to ILEC broadband services to provide their own enterprise broadband services.³¹

The Commission’s precedents also demonstrate the significance of Section 706 in determining the appropriate geographic market definition in evaluating broadband competition.³² As the Commission has noted, it “employ[s] different geographic market definitions to carry out the differing statutory, economic, and policy goals of the proceeding at hand.”³³ In choosing a market definition to evaluate broadband competition, a key “statutory . . . goal[]” is Section 706’s broadband deployment imperative. For example, in affirming the *Section 271 Broadband Forbearance Order*, the court in *EarthLink* specifically affirmed the Commission’s analysis of competition on a nationwide basis and noted that the Commission’s approach was “[g]uided by

²⁹ See, e.g., *AT&T Forbearance Order*, 22 FCC Rcd at 18718 ¶ 21.

³⁰ See, e.g., *AT&T Forbearance Order*, 22 FCC Rcd at 18718 ¶ 21 n.87. See also Brief for the Federal Communications Commission at 23, *Ad Hoc Telecommunications Users Committee, et al. v. FCC*, No. 07-1426 (D.C. Cir. filed Dec. 3, 2008) (“a nationwide approach is particularly appropriate for broadband markets, such as [for enterprise broadband services], that are emerging and changing”).

³¹ See Petition at 14-16, 28-39.

³² Section 706 of the Telecommunications Act of 1996 requires the Commission to “encourage the deployment . . . of advanced telecommunications capability . . . by utilizing” such measures as “regulatory forbearance.” 47 U.S.C. § 1302(a).

³³ *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metro. Statistical Area*, 20 FCC Rcd 19415, 19438 ¶ 50 n.129 (2005) (citing previous use of “a national geographic market”), *aff’d sub nom. Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

section 706.”³⁴ Similarly the D.C. Circuit rejected challenges to the market definitions used in the *Enterprise Broadband Forbearance Orders*, citing “the rapidly changing state of the overall broadband market and § 706’s direction that the FCC may look to and attempt to shape possible future developments in regulating broadband.”³⁵

Section 706’s directive that the Commission should use forbearance to “encourage the deployment” of broadband services thus reinforces the APA and regulatory parity principles in mandating the same nationwide geographic market definition in this proceeding that the Commission has used in prior proceedings involving an evaluation of broadband competition. The *Qwest Phoenix Forbearance Order* underscored this point by expressly acknowledging that forbearance requests involving broadband services must be reviewed pursuant to “the direction of section 706,” thus requiring a “different analysis” from the one applied to the legacy services in the case before it.³⁶

III. CONCLUSION

Because the Commission has granted forbearance for all of the other major national ILEC providers of enterprise broadband service, based on a nationwide geographic market definition, the APA and the Commission’s regulatory parity policy require the same approach for all of CenturyLink’s customers. Moreover, the Commission has found in various proceedings that the nature of broadband service markets, as well as Section 706, require a nationwide geographic market definition in evaluating competition. Nothing in the PN suggests any reason for a different conclusion in this proceeding. Contrary approaches appropriate for legacy service

³⁴ *Earthlink*, 359 F.3d at 9.

³⁵ *Ad Hoc Appeal*, 572 F.3d at 908 (citing *EarthLink*, 462 F.3d at 8).

³⁶ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8644 ¶ 39.

forbearance requests, such as the approach taken in the *Qwest Phoenix Forbearance Order*, are not suitable for, and have never been applied, in broadband forbearance requests.

Respectfully submitted,

WILKINSON BARKER KNAUER, LLP

Craig J. Brown
1099 New York Avenue, NW
Suite 250
Washington, D.C. 20001
303-992-2503
craig.j.brown@centurylink.com

By: /s/ Bryan N. Tramont
Bryan N. Tramont
Russell P. Hanser
Frank W. Krogh
2300 N Street, NW
Suite 700
Washington, D.C. 20037
202-783-4141

Its Attorneys

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